RECENT DECISIONS.

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ASSIGNMENTS—CLAIMS AGAINST THE UNITED STATES.—The assignee of claims against the United States brought conversion against the assignor who had collected the claims as agent for the assignee, and had refused to turn over the proceeds. *Held,* as the assignment was absolutely void because contrary to United States Rev. Stat. § 3477, the action of the conversion would not lie. *Manhattan Commercial Co.* v. *Paul* (1916) 216 N. Y. 481.

All assignments of claims against the United States are void by U. S. Rev. Stat., § 3477, unless certain conditions named therein are complied with, and this section has been said to embrace all claims however arising, of whatever nature, and whenever or wherever presented. *United States* v. *Gillis* (1877) 95 U. S. 407; *Spofford* v. *Kirk* (1878) 97 U. S. 484. Inasmuch, however, as the statute is to protect the government, it cannot be used by debtors to escape their creditors; *Peoples Trust Co.* v. *United States* (1903) 38 Ct. Cl. 359, 392; and, therefore, assignments by insolvent or bankrupt debtors for the benefit of the creditors do not come within its provisions, *Goodman* v. *Niblack* (1880) 102 U. S. 556; *Butler* v. *Goreley* (1892) 146 U. S. 303, 13 Sup. Ct. 84, nor in fact any assignment by operation of law. See *Erwin* v. *United States* (1878) 97 U. S. 392, 397; *Price* v. *Forrest* (1899) 173 U. S. 410, 19 Sup. Ct. 434. The voluntary transfer of a claim by way of mortgage for the security of a debt, even though made absolute by a judicial sale, is contrary to the section and void, *St. Paul etc. R. R.* v. *United States* (1885) 112 U. S. 733, 5 Sup. Ct. 366, but the statute does not affect the rights of a mortgagee of real estate leased to the government, nor the pledgee of rents thereof, to recover from the mortgagor or pledgor the rents paid to them by the United States. *Freeman's Savings etc. Co.* v. *Shepherd* (1888) 127 U. S. 494, 505, 8 Sup. Ct. 1250. Moreover, the section does not interfere with the equitable right of subrogation, *American Tobacco Co.* v. *United States* (1897) 32 Ct. Cl. 207, nor does it include the contingent fee of an attorney; but it does include a provision in the contract making this fee a lien on the claim. *Nutt* v. *Knut* (1906) 200 U. S. 12, 27 Sup. Ct. 216; *Wassell* v. *Armstrong* (1880) 35 Ark. 247, 265; *contra, Jones* v. *Blacklidge* (1872) 9 Kan. 562. As the section is intended for the protection of the government, many state courts have held that it does not apply to actions between the parties. *Hawes & Co.* v. *Trigg Co.* (1909) 110 Va. 165, 65 S. E. 538; *York* v. *Conde* (1895) 147 N. Y. 486, 42 N. E. 193; *Thayer* v. *Pressey* (1900) 175 Mass. 225, 56 N. E. 5. But the U. S. Supreme Court has held that the assignee has no rights against the assignor as the assignment is absolutely void. *National Bank etc.* v. *Downie* (1910) 218 U. S. 345, 31 Sup. Ct. 89. Since it is a question whether such cases decided in the state courts are reviewable in the United States Courts, *Conde* v. *York* (1898) 168 U. S. 642, 18 Sup. Ct. 234; but see *Nutt* v. *Knut, supra,* it is commendable that the court in the principal case reversed its former holding for the sake of comity.

BANKRUPTCY—ACT OF BANKRUPTCY—APPOINTMENT OF A RECEIVER BECAUSE OF INSOLVENCY.—A receiver was appointed for a corporation in the state court on the ground that the corporation was in "imminent danger of insolvency". Upon a petition in the federal court to have the corporation declared a bankrupt under Bankruptcy Act 1898, c. 541, § 3a (4), making the appointment of a receiver because of insolvency an act of bankruptcy, *held,* the appointment was not made because of "insolvency" as defined in § 1 (15) as it appeared that the fair value of the property of the corporation was almost double the amount of its debts. *In re Maplecroft Mills* (C. C. A. 4th Cir. 1915) 226 Fed. 115.

Insolvency within the meaning of the Bankruptcy Act occurs, not when the debtor is unable to meet his obligations, as at common law, but when the aggregate of his property at a fair valuation is not sufficient in amount to pay his debts. Bankruptcy Act 1898, c. 541, § 1 (15). *In re William S. Butler & Co.* (C. C. A. 1913) 207 Fed. 705. It is only where insolvency in the latter sense is made the ground for the appointment of a receiver that there is an act of bankruptcy under § 3a (4), *In re Golden Malt Cream Co.* (C. C. A. 1908) 164 Fed. 326, although insolvency need not be stated *eo nomine. In re Belfast Mesh Underwear Co.* (D. C. 1907) 153 Fed. 224. The principal case is therefore sound in refusing to consider "imminent danger of insolvency" equivalent to insolvency under § 3a (4). *In re Perry Aldrich Co.* (D. C. 1908) 165 Fed. 249; but see *In re Electric Supply Co.* (D. C. 1909) 175 Fed. 612. When the decree in the state court appointing the receiver expressly states the grounds on which the appointment is made, no other evidence is admissible to contradict it, *In re Spalding* (C. C. A. 1905) 139 Fed. 244, but if no grounds are stated in the decree resort may be had to evidence *aliunde*; *Blue Mt. etc. Co.* v. *Portner* (C. C. A. 1904) 131 Fed. 57; *In re Muir* (D. C. 1914) 212 Fed. 500; and if it appears that insolvency was a substantial ground for the appointment, an act of bankruptcy was committed. *Beatty* v. *Andersen Co.* (C. C. A. 1906) 150 Fed. 293. In this respect, however, it should be noted that there is a clear distinction between the first and second clauses of § 3a (4). Black, Bankruptcy, § 95. The former requires insolvency as a matter of fact when the application for a receiver is made and the ground on which the appointment is made is immaterial. *Exploration Co.* v. *Pacific Co.* (C. C. A. 1910) 177 Fed. 825; *Blackstone* v. *Everybody's Store* (C. C. A. 1913) 207 Fed. 752. The second clause, on the other hand, which is applicable to the principal case, requires merely that the appointment be made because of insolvency and the existence of insolvency as a matter of fact is immaterial. *In re Boston & Oaxaca Mining Co.* (D. C. 1909) 181 Fed. 422; Black, Bankruptcy, § 95. The court in the principal case, therefore, in requiring the petitioners to allege insolvency as a matter of fact, appears to be laying down the rule applicable to the first clause rather than to the second.

CONSTITUTIONAL LAW—OFFICERS—EXEMPTION FROM ARREST AND SERVICE OF CIVIL PROCESS.—A summons was served upon the defendant, who filed a plea in abatement on the ground that a statute exempted legislators from service of any civil process during the sessions of the General Assembly. He also claimed immunity from service under a constitutional provision granting privilege from arrest to members while the General Assembly was in session. *Held,* the exemption from arrest provided by the constitution does not include exemption from

service of civil process; held also, two judges dissenting, the statute violates that section of the constitution which prohibits the enactment of any local law granting special immunity to an individual. *Phillips* v. *Browne* (Ill. 1915) 110 N. E. 601.

Although the common law of England and of this country held legislators immune from arrest in civil suits while in attendance at legislative sessions, See *Williamson* v. *United States* (1907) 207 U. S. 425, 28 Sup. Ct. 163, it has never regarded them as exempt from service of civil process. *Berlet* v. *Weary* (1903) 67 Neb. 75, 93 N. W. 258; *Merrick* v. *Giddings* (1879) 14 D. C. 55; *contra, Bolton* v. *Martin* (1788) 1 Dall. 296; *Ross* v. *Brown* (1889) 7 Pa. Co. Ct. 142. In some states, however, such immunity has been granted by constitutional provisions, *Tillinghast & Arthur* v. *Carr* (S. C. 1827) 4 McCord *152; *Cook* v. *Senior* (1896) 3 Kan. App. 278, 45 Pac. 126, or by statute. *King* v. *Coit* (Conn. 1810) 4 Day 129. But, excepting a negligible minority of cases, the principal case follows practically all the authorities in holding that a provision for immunity from arrest does not include exemption from service of civil process. *Worth* v. *Norton* (1899) 56 S. C. 56; 33 S. E. 792; *Rhodes* v. *Walsh* (1893) 55 Minn. 542, 57 N. W. 212; *Howard* v. *Trust Co.* (1898) 12 App. D. C. 222; *Kimberly* v. *Butler* (C. C. 1869) 14 Fed. Cas. 498; *contra, Miner* v. *Markham* (1886) 28 Fed. 387; see *Anderson* v. *Rountree* (Wis. 1841) 1 Pinn. 115. It is urged in the contrary holdings that the legislator's mind should be not less free from diversion than his body in the administration of this particular public business. These reasons though unavailing at common law, point to a reasonable classification based upon a sound policy, and appear cogent enough to rebut the contention that the statute is unconstitutional. The dissenting opinion, therefore, seems preferable.

CONTRACTS—PUBLIC CONTRACTS—RIGHT OF INDIVIDUAL TO ENFORCE.—The defendant railway company covenanted with the City of Rensselaer to pay all damages caused to abutting land owners by the elevation of the grade of a street crossing. *Held,* the plaintiff, an abutting owner, can enforce this covenant, under the doctrine of *Lawrence* v. *Fox* (1889) 20 N. Y. 268. *Rigney* v. *N. Y. C. & H. R. R.* (N. Y. Ct. of App. 1916) 54 N. Y. L. J. 1683.

Those who contract with the State or a municipal corporation to do things necessary for the public welfare are liable to a private person injured by their failure to fulfill their contract. *Sullivan* v. *Staten Island Ry.* (1900) 50 App. Div. 558, 64 N. Y. Supp. 91; *Robinson* v. *Chamberlain* (1866) 34 N. Y. 389; *Rochester Tel. Co.* v. *Ross* (1909) 195 N. Y. 429, 38 N. E. 793. The reason given by the earlier decisions was that such contractors are quasi-public officers, the extent of whose duties is determined by their contracts; it seems that their contracts with State or City operated like statutes or ordinances, and any one may enforce a right given him by statute. *Robinson* v. *Chamberlain, supra*; see *Wainwright* v. *Queens Co. Water Co.* (1894) 78 Hun 146, 28 N. Y. Supp. 987. Consequently, actions against them by individuals sounded in tort, though their contracts were admissible in evidence to prove the existence of the duty. *McMahon* v. *Second Avenue Ry.* (1878) 75 N. Y. 231; *Bateman* v. *Forty-Second Street Ry.* (1889) 5 N. Y. Supp. 13. The later doctrine of the New York courts, however, is to let the plaintiff sue directly on the contract as a ben-

eficiary, as in the principal case. *Little* v. *Banks* (1881) 85 N. Y. 258; *Pond* v. *New Rochelle Water Co.* (1906) 183 N. Y. 330, 76 N. E. 211; *Smyth* v. *New York* (1911) 203 N. Y. 106, 96 N. E. 409. This case is scarcely within the decision of *Lawrence* v. *Fox, supra,* as limited in *Vrooman* v. *Turner* (1877) 69 N. Y. 280, because the promisee here, the City, could not be liable to the beneficiary for these damages. *Cf. French* v. *Vix* (1894) 143 N. Y. 90, 37 N. E. 612. Nor does the analogy seem close between the principal case and *Todd* v. *Weber* (1884) 95 N. Y. 181, where a child was allowed to sue on a contract made by her father for her benefit. But see *Pond* v. *New Rochelle Water Co., supra.* To have based the plaintiff's right of action on the beneficiary theory in this line of cases looks like a gratuitous violation of principle, since a remedy might have been found in tort under the old doctrine. The effect of these decisions has already extended beyond public contracts. In reliance on them, a member of a labor union, *Gulla* v. *Burton* (1914) 164 App. Div. 293, 149 N. Y. Supp. 952, or a theatrical organization, *Lovitt* v. *Ill. Surety Co.* (1914) 88 Misc. 100, 150 N. Y. Supp. 609, has been allowed to recover on a contract made by the association for his benefit.

DEBT—EMBEZZLEMENT CREATING A DEBT.—The plaintiff was a creditor of a share-holding secretary of the defendant association. The security for the debt was the stock held by the secretary. The latter embezzled the funds of the defendant, in excess of the debt due the plaintiff. On the death of the secretary, the plaintiff requested a transfer of the stock to his name on the books of the defendant association. This was refused, on the grounds that a by-law of the association gave it a lien on a share-holder's stock for any indebtedness due to the association. The plaintiff claimed that the embezzlement did not constitute such an indebtedness and brought suit. *Held,* by a liberal interpretation the word debt included the defendant's claim and gave it a prior lien on the stock. *Jewell* v. *Huhn* (Iowa 1915) 155 N. W. 174. See Notes, p. 243.

DEBT—JUDGMENT FOT TORT AS A DEBT.—Judgment was had against the defendant in an action for seduction, and execution was returned unsatisfied. Under a statute the defendant was arrested, whereupon he moved to be discharged. *Held,* the judgment arising from the tort was a debt, and hence the defendant's imprisonment violated the constitutional prohibition against imprisonment for debt. *Bronson* v. *Syverson* (Wash. 1915) 152 Pac. 1039. See Notes, p. 243.

DEEDS—CONSTRUCTION—REPUGNANT CLAUSES.—The owners of a certain piece of property executed a deed, to the effect that they did thereby "grant, bargain, sell, and convey" the lands to trustees for the Big Lake Shooting Club. A later clause in the deed stated that "it is understood that said property is to be used as a fish and game preserve only"; and a reservation was made of the right to cut timber. *Held,* the deed did not pass title to the land, but merely gave a right to hunt and fish thereon. *Kenner* v. *State* (Ark. 1915) 180 S. W. 492. See Notes, p. 245.

EMINENT DOMAIN—ACCEPTANCE OF AWARD—EFFECT ON RIGHT TO APPEAL.—Where defendant in condemnation proceedings appealed on the ground of inadequacy of damages after accepting the amount of the

commissioners' award, *held,* his right to appeal was not thereby lost. *Green* v. *City of New York* (1916) 216 N. Y. 489.

The procedure in eminent domain proceedings is purely statutory, see *State* v. *Superior Court* (1914) 80 Wash. 417, 141 Pac. 906, and the statutes fall into two general groups. One class provides that on appeal the petitioner shall pay the amount of the award into court, not as payment of it to the defendant, but as security for payment on determination of the appeal; *Burns* v. *Chicago, etc. Ry.* (1897) 102 Iowa 7, 70 N. W. 728; and, as the money does not belong to the landowner, if he draws it out of court, his right to appeal is entirely lost, his voluntary acceptance being a complete satisfaction of his claim, leaving nothing from which to appeal. *Stauffer* v. *Cincinnati R. & M. R. R.* (1904) 33 Ind. App. 356, 70 N. E. 543; see *Pyle* v. *Woods* (1910) 18 Idaho 674, 111 Pac. 746. Under the second class of statutes, payment by the petitioner whether into court or to the landowner himself, is not made merely as security, but as payment of the award itself to the landowner, the latter being liable to a judgment against him for the difference in the amount of damages, if on reassessment, the second award is smaller than the first, *St. Louis O. H. & C. Ry.* v. *Fowler* (1893) 113 Mo. 458, 20 S. W. 1069; *Low* v. *Concord R. R.* (1885) 63 N. H. 557, 3 Atl. 739, and being entitled to interest only on the increase of the award if the second assessment is larger. *In re Board of Water Commrs.* (1909) 195 N. Y. 502, 88 N. E. 1102. The landowner by accepting the first award does not lose his right to a reassessment of damages on appeal, for, as the money belongs to him whether he accepts it or not, by accepting he does not add to his right of complete control. *Chicago Great Western R. R.* v. *Kemper* (1914) 256 Mo. 279, 166 S. W. 291; *Ga. Granite R. R.* v. *Venable* (1907) 129 Ga. 341, 58 S. E. 864; see *Matter of N. Y. & Harlem R. R.* (1885) 98 N. Y. 12. But the defendant, after accepting the award, cannot contest the validity of the condemnation proceedings, his right to appeal being limited to contesting the adequacy of the compensation. *Kansas City So. Ry.* v. *Second St. Improvement Co.* (1914) 256 Mo. 386, 166 S. W. 296; *In re Condemnation of Land, etc.* (Mo. App. 1915) 176 S. W. 529. The principal case falls under the latter class of statutes and the decision is undoubtedly correct.

EMINENT DOMAIN—CONDEMNATION OF FEE IN EXISTING STREET—NEW YORK CITY CHARTER.—The board of estimate and apportionment of New York City, having the authority by charter to condemn the fee in land required for street purposes, instituted condemnation proceedings. The street was already in existence and it was therefore objected that the land was not required for street purposes. *Held,* the city may condemn the fee in existing streets, and the determination of the city's requirements by the board of estimate and apportionment is final. *Matter of City of New York, Ely Ave.* (N. Y. Ct. of App. 1916) 54 N. Y. L. J. 1633.

The fact that one exercising the right of eminent domain already has an interest in the land is no bar to his condemning a greater interest, up to the extent of the legislative authorization. *Matter of New York & Harlem R. R.* v. *Kip* (1871) 46 N. Y. 546. Therefore under the New York statute conferring a right to condemn the fee, property already dedicated to the public for street purposes has been taken. *Wyman* v. *Mayor* (N. Y. 1833) 11 Wend. *486; *Matter of Thirty-second St.* (N. Y. 1838) 19 Wend. 128; *Matter of Twenty-*

ninth St. (N. Y. 1841) 1 Hill 189. The fee so acquired is not absolute, however, but is held in trust for the public for street purposes. *People* v. *Kerr* (1863) 27 N. Y. 188. This has led some of the lower courts to adopt the view, more or less general in other jurisdictions, 1 Lewis, Eminent Domain (3rd Ed.) § 128, that the fee gives no greater rights to the city than an easement, and to hold, therefore, that the fee in an existing street could not be condemned by the city. *Matter of City of New York, Eighty-fifth St.* (1904) 45 Misc. 162, 91 N. Y. Supp. 894; *cf. Matter of City of New York, Montague St.* (1914) 87 Misc. 120, 150 N. Y. Supp. 382. But the New York decisions establish a difference in the rights of abutting owners under the two conditions, the building of street railways or surface steam roads in the streets being deemed an injury to an abutter who retains the fee, *Craig* v. *Rochester, C. & B. R. R.* (1868) 39 N. Y. 404; *Williams* v. *New York Cent. R. R.* (1857) 16 N. Y. 97, but not to one who has transferred the fee to the city. *People* v. *Kerr, supra; Fobes* v. *Rome, W. & O. R. R.* (1890) 121 N. Y. 505, 24 N. E. 919. Recognizing this difference, the Court of Appeals has given substantial damages for the condemnation of the fee in an established street. *City of Buffalo* v. *Pratt* (1892) 131 N. Y. 293, 30 N. E. 233. In accordance with this is the principal case, which rejects the doctrine of the lower courts and recognizes the right of the board of estimate and apportionment to condemn the fee if required. The question of whether it is required is not a matter for judicial review. *Matter of Union Ferry Co.* (1885) 98 N. Y. 139, 153; *McCabe* v. *City of New York* (1915) 213 N. Y. 468, 107 N. E. 1049.

EVIDENCE—PAROL EVIDENCE RULE—WARRANTY—UNIFORM SALES ACT.—In an action for part of the purchase price of barges, the defendant introduced testimony of plaintiff's oral representation that the barges were in good and navigable condition and were not out of repair. *Held,* notwithstanding the provision in the Uniform Sales Act that any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the tendency is to induce buyer to purchase goods and if the buyer purchases the goods relying thereon, such parol evidence was not admissible to establish a warranty when the written contract purported to contain the entire agreement. *Marmet Coal Co.* v. *People's Coal Co.* (C. C. A., 6th Cir., 1915) 226 Fed. 646.

In the United States it is almost uniformly held that, in the absence of fraud or mutual mistake, parol evidence of warranty cannot be introduced to vary what purports to be a complete written contract. 1 Parson, Contracts (9th ed.) *589; 2 Mechem, Sales § 1254; *Witteman Co.* v. *Beck etc. Co.* (1914) 183 Mich. 227, 100 N. W. 109; *Thomas* v. *Scutt* (1891) 127 N. Y. 133, 27 N. E. 961; *Seitz* v. *Brewers' Refrigerating Co.* (1891) 141 U. S. 510, 12 Sup. Ct. Rep. 46. The principal case follows this great weight of authority and seems clearly correct in not allowing the broad language of the Uniform Sales Act to change the parol evidence rule. *Cf. United Iron Works* v. *Outer Harbor etc. Co.* (1914) 168 Cal. 81, 141 Pac. 917. A few decisions, however, are in accord with the modern English view, which regards such a warranty as an undertaking collateral to the principal contract, and allows a parol warranty to control the contract in respect to matters concerning which the latter is wholly silent. *Edward Lloyd, Ltd.* v. *Sturgeon Falls Pulp Co., Ltd.* (1901) 85 L. T. R. 162; *Waterbury* v. *Russell* (Tenn. 1874) 8 Baxt. 159; see *Chapin* v. *Dobson* (1879)

78 N. Y. 74. If the written contract does not purport to contain the whole agreement, parol evidence of a warranty is admissible, provided it does not alter or is not inconsistent with the written instrument. *Tainter* v. *Wentworth* (1911) 107 Me. 439, 78 Atl. 572; *Hersom* v. *Henderson* (1850) 21 N. H. 224; *Chapin* v. *Dobson, supra*; *Cooper* v. *Payne* (1906) 186 N. Y. 334, 78 N. E. 1076, (distinguish from *Colt* v. *Demarest & Co.* (N. Y. 1913) 159 App. Div. 394, 144 N. Y. Supp. 557 and *Eighmie* v. *Taylor* (1885) 98 N. Y. 288); see 10 Columbia Law Rev., 76. Such evidence is also admissible when the writing is not in fact a contract. Burdick, Sales (3rd ed.) 153; 1 Columbia Law Rev., 404; see *Thomas* v. *Scutt, supra.*

FEDERAL EMPLOYER'S LIABILITY ACT—COMPENSATION UNDER STATE STATUTE FOR EMPLOYEE INJURED IN INTERSTATE COMMERCE.—The plaintiff was injured while employed in interstate commerce and compensation was awarded under the Workmen's Compensation Act of the State. *Held,* this was correct, as the Federal Employer's Liability Act, 35 Stat. 65, does not cover the whole field of accidents in interstate commerce, but only applies to injuries due to the negligence of the employer; while the state statute is founded on a different theory and makes the employer liable irrespective of negligence. *Winfield* v. *N. Y. C. & H. R. R. R.* (N. Y. Ct. of App., 1915) 110 N. E. 614.

The Federal Employer's Liability Act, 35 Stat. 65, is exclusive of state legislation in the sphere which it occupies, *Mondou* v. *N. Y., N. H. & H. R. R.* (1912) 223 U. S. 1, 32 Sup. Ct. 169; *Vickery* v. *New London etc. R. R.* (1914) 87 Conn. 634, 89 Atl. 277; see *Delaware etc. R. R.* v. *Yurkonis* (C. C. A. 1915) 220 Fed. 429, and has been held to cover the whole field of liability of railroads to employees engaged in interstate commerce. *Hogarty* v. *Phila. & Reading Ry.* (1914) 245 Pa. 443, 91 Atl. 854. Recovery was therefore denied for the deceased's injuries under a state survival statute, since the Act of Congress did not at that time provide for survivial. *St. Louis etc. Ry.* v. *Hesterly Admr.* (1913) 228 U. S. 702, 33 Sup. Ct. 703, reversing S. C. (1911) 98 Ark. 240, 135 S. W. 874; *cf. Ill. Cent. R. R.* v. *Doherty's Admr.* (1913) 153 Ky. 363, 155 S. W. 1119; *Jones* v. *Charleston & W. C. Ry.* (1914) 98 S. C. 197, 82 S. E. 415. When the state statute provides for recovery regardless of the negligence of the defendant, it has been decided that the state compensation law is superseded, as covering the same field as the Federal Act, *Smith* v. *Industrial Accident Comm.* (1915) 26 Cal. App. 560, 147 Pac. 600; *Staley Admx.* v. *Ill. Cent. R. R.* (1915) 268 Ill. 356, 109 N. E. 342; but see *Matter of Jensen* v. *So. Pac. Co.* (1915) 215 N. Y. 514, 109 N. E. 600, though the railway may contract to compensate its interstate employees for accidents. See *Hammill* v. *Pa. R. R.* (1915) 87 N. J. L. 388, 94 Atl. 313. Since Congress intended to base the interstate carrier's liability on negligence alone, all state laws imposing liability for injuries not due to the carrier's negligence are superseded where the employee is engaged in interstate commerce. See *Seaboard etc. Ry.* v. *Horton* (1914) 233 U. S. 492, 34 Sup. Ct. 635. The principal case would hardly seem consistent with this view.

FRAUDULENT CONVEYANCES—CREDITORS—CLAIMANTS EX DELICTO.—The plaintiff seeks to have a conveyance set aside as made with intent to defraud creditors. *Semble,* a claimant *ex delicto* is a creditor within the meaning of that term when it is provided that conveyances to

defraud creditors of the grantor may be set aside. *Henry* v. *Yost* (Wash. 1915) 152 Pac. 714.

It was early the rule in England under the Stat. 13 Eliz. c. 5, which declared that all gifts, grants, etc., to delay, hinder or defraud "creditors and others" of their just and lawful actions, suits, debts, etc., shall be void, that a fraudulent conveyance was void not only as to technical creditors but as to all others who had causes of action or suits against the grantor. See *Twyne's Case* (1601) 3 Coke 80. In this country it is almost universally held that a claimant *ex delicto* is a creditor for the purpose of setting aside a fraudulent conveyance. *Carrel* v. *Meek* (1911) 155 Mo. App. 337, 137 S. W. 19; *Hopewell* v. *Wright* (1911) 37 App. D. C. 247; *Shelby* v. *Ziegler* (1908) 22 Okla. 799, 98 Pac. 989. Several of the states have statutes modeled after the Statute of Elizabeth, affording relief to creditors and others; *Schaible* v. *Ardner* (1893) 98 Mich. 70, 56 N. W. 1105; while other jurisdictions, where the wording of the statutes would seem to embrace technical creditors only, protect claimants *ex delicto* on the grounds that, although a person who has a cause of action for tort is not strictly a creditor, still the common law rule is not abrogated by such statutes, *Fox* v. *Hills* (1815) 1 Conn. 295; *Westmoreland* v. *Powell* (1877) 59 Ga. 256, or that a statute against fraud should be interpreted as liberally as possible. *Walradt* v. *Brown* (1844) 6 Ill. 397. The general rule would seem to be that a claimant *ex delicto* whose cause of action arose prior to, but who obtained judgment after the making of the fraudulent conveyance, is regarded as a creditor, by relation back, as from the time his cause of action arose. See *Washington Nat. Bank* v. *Beatty* (1910) 77 N. J. Eq. 252, 76 Atl. 442. However, it has been held that he is a creditor only from the time his suit is reduced to judgment. *Evans* v. *Lewis* (1876) 30 Oh. St. 11.

FRAUDULENT CONVEYANCES—SALE OF GOODS IN BULK—GENERAL AND JUDGMENT CREDITORS.—The plaintiffs brought an action provided by statute, in their own behalf and in behalf of all other creditors, to constitute one of the defendants a receiver of goods sold to him by the other defendant in violation of the Bulk Sales Law. *Held,* the plaintiffs, although simple contract creditors, are entitled to relief. *Touris* v. *Karantzalis* (App. Div., 1st Dept., 1915) 156 N. Y. Supp. 526.

Under similar statutes making a sale in bulk void or voidable as against creditors unless certain conditions are complied with, but not naming any specific remedy, courts of law have permitted a judgment creditor to levy upon the goods sold as the property of the vendor, *Wilson* v. *Edwards* (1907) 32 Pa. Super. Ct. 295; *Dickinson* v. *Harbison* (1909) 78 N. J. L. 97, 72 Atl. 941, or to attach them, *Carstarphen Warehouse Co.* v. *Fried* (1905) 124 Ga. 544, 52 S. E. 598, and he has even been allowed to maintain garnishment proceedings after the vendee has disposed of the goods and is no longer indebted to the vendor. *Kohn* v. *Fishbach* (1904) 36 Wash. 69, 78 Pac. 199; but see *Bewley* v. *Sims* (Tex. Civ. App. 1913) 145 S. W. 1076. It is an elementary rule in equity that a general creditor or creditor at large is not entitled to relief by a creditor's bill, to set aside a fraudulent conveyance until he has reduced his claim to judgment or acquired some lien upon the property. Bump, Fraudulent Conveyances (4th ed.) §§ 535-540; Wait, Fraudulent Conveyances (3rd ed.) §§ 73, 75; *Crim* v. *Walker* (1883) 79 Mo. 335; see *Frothingham* v. *Hodenpyl* (1892) 135 N. Y. 630, 32 N. E. 240. When these statutes specify a

remedy, the general equitable rule should still decide who may take advantage of it, *Bixler* v. *Fry* (1909) 157 Mich. 314, 122 N. W. 119, unless, as in the principal case, their language fairly shows that the legislature intended to provide for all creditors. The present tendency of the courts is to adopt this latter construction. *Coffey* v. *McGahey* (1914) 181 Mich. 225, 148 N. W. 356; *Scheve* v. *Vanderkolk* (1914) 97 Neb. 204, 149 N. W. 401; see *Seeman* v. *Levine* (1910) 67 Misc. 74, 121 N. Y. Supp. 645; but see *Klein* v. *Maravelas* (Sup. Ct., App. Term, 2nd Dept. 1915) 89 Misc. 466, 152 N. Y. Supp. 584.

HOMICIDE—COMMISSION IN ATTEMPT TO PERPETRATE A FELONY—SUFFICIENCY OF INDICTMENT.—An indictment charged that the defendant committed homicide with a premediated design to effect the death of the deceased. The Statute of the State defined murder in the first degree as any unlawful killing perpetrated from a premediated design, or accompanying the commission of certain enumerated felonies. *Held,* notwithstanding the form of the indictment, it was not error to charge that if the defendant at the time of the killing was engaged in an attempt to perpetrate robbery upon the deceased, he was guilty of murder in the first degree. *Sloan* v. *State* (Fla. 1915) 69 So. 871. See Notes, p. 241.

INSOLVENCY—LEASED PREMISES—COMPENSATION FOR USE OF AFTER BANKRUPTCY.—Where the trustee in bankruptcy of an insolvent lessor sued the banking commissioner who, under statute, took possession of the property and assets of an insolvent trust company, for use and occupation of the leased premises, between the date the company became insolvent and the date the bank commissioner elected not to treat the leasehold as an asset, *held,* the commissioner was liable for the amount of rent stipulated in the lease. *Citizens' Savings & Trust Co.* v. *Rogers* (Wis. 1915) 155 N. W. 155.

The fact of the lessee's bankruptcy does not terminate the lease but the leasehold interest passes to the trustee in bankruptcy if, within a reasonable time, he elects to treat the lease as an asset of the estate for the benefit of creditors, instead of refusing to assume it as being a burden. *In re Frazin* (C. C. A. 1910) 183 Fed. 28; see *In re Scruggs* (D. C. 1913) 205 Fed. 673. This right to elect extends to all classes of liquidators. Glenn, Creditors' Rights and Remedies, § 509. If the trustee assumes the lease, obviously he is liable to the lessor for the rent stipulated therein. The trustee has a right, which will be protected by equity, to occupy the premises for a reasonable period during liquidation without assuming the lease, see *In re Chambers, Calder & Co.* (D. C. 1900) 98 Fed. 865, and may also remain a reasonable time while deliberating on the exercise of his election. See *In re Scruggs, supra.* In either case, however, he is liable by the better reasoned cases for use and occupation; not under the lease, as he did not assume it, but for the reasonable rental value. *In re Sherwoods* (C. C. A. 1913) 210 Fed. 754; *In re J. Frank Stanton Co.* (D. C. 1908) 162 Fed. 169; *In re Grignard Lithographic Co.* (D. C. 1907) 155 Fed. 699. And in arriving at such reasonable value, the rent stipulated in the lease is useful as evidence, but is not conclusive. *In re Sherwoods, supra; In re Adams Cloak, Suit & Fur House* (D. C. 1912) 199 Fed. 337. In the principal case, as the commissioner did

not treat the lease as an asset and therefore did not assume it, it would seem as though the measure of his liability should have been the reasonable rental value.

INSURANCE—BINDING SLIP—EFFECT OF POLICY ISSUED LATER.—An insurance company issued and delivered a formal policy on May 10th providing insurance from April 28th. It was accepted by the insured. A loss occured on April 29th, and when sued on the policy, the insurer tried to introduce evidence to show that the policy did not conform with the original negotiations. *Held,* the evidence is not admissible, for the formal policy merges all prior negotiations in it. *El Dia Ins. Co.* v. *Sinclair* (C. C. A., 2nd Cir., 1915) 54 N. Y. L. J. 1037.

Insurance must often be closed without the delay incident to executing a written policy; and the custom has grown up of using binding slips or memoranda. Richards, Insurance (3rd ed.) § 74 *et seq.* A valid contract of insurance may be created orally, *Hicks* v. *British America Assurance Co.* (1900) 162 N. Y. 284, 56 N. E. 743; see *Shepard* v. *Ins. Co.* (1909) 138 Mo. App. 20, 119 S. W. 984, or by a written binding slip, memorandum or receipt; *Lea* v. *Atlantic Ins. Co.* (1915) 168 N. C. 478, 84 S. E. 813; *Queen Ins. Co.* v. *Hartwell Ice & Laundry Co.* (1910) 7 Ga. App. 787, 68 S. E. 310; *Norwich Union Fire Ins. Soc.* v. *Dalton* (Tex. 1915) 175 S. W. 459; and in either case the contract includes within it the ordinary policy issued by the company, so that all the stipulations and conditions of the policy are binding upon the insured. *Lipman* v. *Niagara Fire Ins. Co.* (1890) 121 N. Y. 454, 24 N. E. 699; *Hicks* v. *British America Assurance Co., supra*; see *Concordia Fire Ins. Co.* v. *Heffron* (1899) 84 Ill. App. 610. Some of the earlier cases, however, seem to look upon oral contracts not as present insurance but merely agreements to insure. *Hardwick* v. *State Ins. Co.* (1892) 23 Ore. 290, 31 Pac. 656; *Campbell* v. *American Fire Ins. Co.* (1888) 73 Wis. 100, 40 N. W. 661. The binding slip or the oral contract standing alone not being the complete contract may be explained by extrinsic evidence. *Underwood* v. *Greenwich Ins. Co.* (1900) 161 N. Y. 413, 55 N. E. 936. But where the parties assent to the formal written policy all previous negotiations and verbal statements are merged in it. *Ins. Co.* v. *Lyman* (1872) 82 U. S. 664; *Ins. Co.* v. *Mowry* (1877) 96 U. S. 544. And in such a case, except where there is fraud or mistake, that policy is the only admissible evidence of the terms of the contract. Richards, Insurance (3rd ed.) § 85.

INSURANCE—CASUALTY INSURANCE—LIABILITY OF INSURER FOR INSURED'S EXPENSE OF COMPLETING DEFENSE ABANDONED BY INSURER.—The defendant insured the plaintiff "against loss from the liability imposed by law" through his employee's claims for personal injuries, and also agreed to defend such claims "unless it elect to settle it or to pay the assured the indemnity." The defendant entered upon the defense of a claim but later abandoned it. *Held,* though the defendant was not bound to defend groundless claims against the plaintiff, he was bound by his election to defend, and the assured may recover the expense of successfully completing the defense. *Sachs* v. *Maryland Casualty Co.* (N. Y. App. Div., 2nd Dept., 1915) 54 N. Y. L. J. 1185.

It is the general rule that, under provisions similar to those in the principal case, the assured cannot recover costs or expenses in successfully defending an action for alleged injuries which the company has refused to defend, *Nesson* v. *United States Cas. Co.* (1909) 201 Mass.

71, 87 N. E. 191; *Cornell* v. *Travelers' Ins. Co.* (1903) 175 N. Y. 239, 67 N. E. 578; *cf. Munson* v. *Standard Marine Ins. Co.* (1907) 156 Fed. 44, 84 C. C. A. 210; *contra, South Knoxville Brick Co.* v. *Empire State Surety Co.* (1912) 126 Tenn. 402, 150 S. W. 92, nor the expense of compromising a claim where the assured was not liable, *Henderson etc. Co.* v. *Maryland Cas. Co.* (1910) 153 N. C. 275, 69 S. E. 234, since such policies do not undertake to indemnify the assured against groundless claims. But if the suit is one covered by the policy, and for which the plaintiff is liable, failure of the defendant to defend is a breach of his contract, and the plaintiff is at liberty to take up the defense, or to make a prudent settlement. *St. Louis etc. Co.* v. *Maryland Cas. Co.* (1906) 201 U. S. 173, 26 Sup. Ct. Rep. 400; *Bradley* v. *Standard etc. Ins. Co.* (N. Y. 1904) 46 Misc. 41, 93 N. Y. Supp. 245; see *Murch Bros. Co.* v. *Fidelity & Cas. Co.* (Mo. App. 1915) 176 S. W. 399. In such a case the liability of the plaintiff and the amount may be determined in the suit against the insurer, the amount of the settlement being *prima facie* the amount of the liability. *Butler* v. *American Fidelity Co.* (1913) 120 Minn. 157, 139 N. W. 355; see *St. Louis etc. Co.* v. *Maryland Cas. Co., supra.* If the insurer undertakes the defense but subsequently withdraws, it has been held that it is estopped to deny that the accident was within the terms of the policy, *Glens Falls etc. Co.* v. *Travelers' Ins. Co.* (1900) 162 N. Y. 399, 56 N. E. 897; *Canning Co.* v. *Gauranty & Accident Co.* (1911) 154 Mo. App. 327, 133 S. W. 664, or, as in the principal case, that the defendant by its election becomes bound by the contract to defend. *Brassil* v. *Maryland Cas. Co.* (1911) 147 App. Div. 815, 133 N. Y. Supp. 187; affd. 210 N. Y. 235, 104 N. E. 622.

INSURANCE—TEMPORARY BREACH OF WARRANTY—EFFECT.—A fire insurance policy provided that in case of any transfer of the title to the property or assignment of the policy without the consent of the insurer, the policy should become null and void. The plaintiff transferred the property and policy with permission, but it was subsequently reconveyed to him without permission after several unsanctioned conveyances. *Held,* the liability of the company was suspended after the conveyances by the plaintiff's grantee, but revived on the reconveyance to the plaintiff. *Germania Fire. Ins. Co.* v. *Turley* (Ky. 1915) 179 S. W. 1059.

A warranty in an insurance policy is a condition precedent to recovery for loss. *Imperial Fire. Ins. Co.* v. *Coos County* (1894) 151 U. S. 452, 14 Sup. Ct. 379. Accordingly, on theory, any breach of warranty in a policy should make the contract void. Richards, Insurance (3rd ed.) § 247. Some courts, however, under the guise of construction, have declared that the policies refer only to breaches existing at the time of the loss. See *German Mut. Fire. Ins. Co.* v. *Fox* (Neb. Unof. 1903) 96 N. W. 652; *Traders Ins. Co.* v. *Catlin* (1896) 163 Ill. 256, 45 N. E. 255; *Power* v. *Ocean Ins. Co.* (1851) 19 La. 28, overruled by *Jones* v. *Mich. F. & M. Ins. Co.* (1913) 132 La. 847, 61 So. 846. This clearly is not construing the policy but making a new contract for the parties. *Imperial Fire Ins. Co.* v. *Coos County, supra; Marcus* v. *Rhode Island Ins. Co.* (1915) 187 Mo. App. 134, 173 S. W. 80; Richards, Insurance (3rd ed.) § 247; *Bemis* v. *Harbor Creek Mut. Fire Ins. Co.* (1901) 200 Pa. 340, 49 Atl. 769. Since upon a breach the policy becomes void by its very terms, recovery may thereafter be had only where the insurer has waived the breach or estopped itself. See

Georgia Home Ins. Co. v. *Rosenfield* (C. C. A. 1899) 95 Fed. 358. As in the principal case the first transfer of the property and policy was assented to, the transferee became the insured and the plaintiff had no interest in the contract. The re-conveyance to the plaintiff was not therefore a conveyance to a contracting party, but was in fact an unauthorized assignment. Accordingly, the questionable doctrine of temporary breach, which the court assumed controlled the case, has no application at all, as the breach existed at the time of the loss.

INTERSTATE COMMERCE—TELEGRAPH COMPANIES—TRANSMISSION OF TELEGRAM BETWEEN POINTS WITHIN THE SAME STATE THROUGH POINTS IN ANOTHER STATE.—The plaintiff sued under an Arkansas statute for mental suffering due to the defendant's negligent delay in transmitting a telegram from Vandervoort, Ark., to Warren, Ark. The defendant proved that the telegram was routed through Missouri. *Held,* this was intrastate, not interstate, commerce, and was subject to the Arkansas statute, especially since there was no proof that the only method of transmission between Vandervoort and Warren necessarily carried the message beyond the State. *Western Union Tel. Co.* v. *Sharp* (Ark. 1915) 180 S. W. 504.

The transmission of telegrams from one state to another is interstate commerce, and hence is not subject to state control. *W. U. Tel. Co.* v. *Pendleton,* (1887) 122 U. S. 347, 7 Sup. Ct. Rep. 1126. However, in the absence of federal action, statutes providing reasonable police regulations of a local nature are upheld, though incidentally affecting this interstate commerce. *W. U. Tel. Co.* v. *James* (1896) 162 U. S. 650, 16 Sup. Ct. Rep. 934; *cf. W. U. Tel. Co.* v. *Bilisoly* (1914) 116 Va. 562, 82 S. E. 91. The Supreme Court has held that a State may not penalize delay in delivering outside the State a telegram sent from within it, *W. U. Tel. Co.* v. *Brown* (1914) 234 U. S. 542, 34 Sup. Ct. Rep. 955, and this decision is construed by the courts of Arkansas to prevent the application of the statute providing damages for mental anguish in the case of a telegram sent into the State from without. *W. U. Tel. Co.* v. *Holder* (Ark. 1915) 174 S. W. 552. Transportation by rail between two points in a State which traverses another State en route is subject to the taxing power of the State, *Lehigh Valley Ry.* v. *Pennsylvania* (1892) 145 U. S. 192, 12 Sup. Ct. Rep. 806, and, relying on this case, the state courts held that the transmission of telegrams between points within the same State through points in another State is intrastate commerce. *State ex rel., R. R. Comm.* v. *W. U. Tel. Co.* (1893) 113 N. C. 213, 18 S. E. 389; *W. U. Tel. Co.* v. *Reynolds* (1902) 100 Va. 459, 41 S. E. 856. But the United States Supreme Court, apparently disapproving these decisions, has since held such commerce interstate for purposes of rate regulation, in the case of railways; *Hanley* v. *Kansas City So. Ry.* (1903) 187 U. S. 617, 23 Sup. Ct. Rep. 214; and the statement in the principal case that a message between points within the state is intrastate regardless of the fact that the state line is crossed seems doubtful. However, it seems undesirable to allow a telegraph company to evade state laws by so adjusting the wires as to make messages interstate or intrastate at its option, and, unless the company proves that the usual route is interstate or that such a route was made necessary by circumstances, the state statutes should be enforced. *W. U. Tel. Co.* v. *Taylor* (1914) 57 Ind. App. 93, 104 N. E. 771; *cf. Harter* v. *Charleston & W. C. Ry.* (1910) 85 S. C. 192, 67 S. E. 290.

JUDGMENTS—EQUAL LIENS—EFFECT OF ISSUANCE OF EXECUTION.—Three judgments were recovered against a debtor who then had no property, but who subsequently inherited real estate not sufficient in value to satisfy all the judgments. One creditor issued an execution and had the land sold, and claimed the right of prior satisfaction. *Held,* he acquired no priority by issuing the execution and selling the land. *Hulbert* v. *Hulbert* (1916) 216 N. Y. 430. See Notes, p. 237.

MARRIAGE—ANNULMENT—INSANITY.—The committee of the person and property of a lunatic brought an action to annul his marriage. The Domestic Relations Law, § 7, provided that action to annul could be brought only as provided in the Code of Civil Procedure. *Held,* Scott, *J.,* dissenting, the committee could not maintain the action under §§ 1747 and 1748 of the code, because not named thereon; nor under § 2340, since the committee under that section can bring only such actions as the lunatic himself could have brought, hence the action must be dismissed. *Walter* v. *Walter* (N. Y. App. Div., 1st. Dept., 1915) 156 N. Y. Supp. 713. See Notes, p. 234.

OFFICERS—APPOINTMENT FOR A FIXED TERM—POWER OF REMOVAL.—The plaintiff was appointed commissioner of motor vehicles for a term of four years by the board of sinking fund commissioners under a statute giving the board such authority. *Held,* the commissioners had no power to remove the plaintiff from office in the absence of statutory authority. *Commissioners of Sinking Fund* v. *Byars* (Ky. 1915) 180 S. W. 380.

When the term of an officer is not fixed by law and no provision is made for removal either by the constitution or by statute, the power of removal is incident to the power of appointment. Mechem, Public Officers § 445; *Ex parte Hennen* (1839) 38 U. S. 230; *State* v. *Dahl* (1909) 140 Wis. 301, 122 N. W. 748; *cf. Sponogle* v. *Curnow* (1902) 136 Cal. 580, 69 Pac. 255. But where the tenure of office is for a definite term, then, in the absence of constitutional or statutory provision, the appointing power cannot arbitrarily remove the officer. *Bruce* v. *Matlock* (1908) 86 Ark. 555, 111 S. W. 990. In many jurisdictions however, certain officers are authorized by statute to remove, for cause, an incumbent whose term is fixed by law; *Parsons* v. *U. S.* (1897) 167 U. S. 324, 17 Sup. Ct. 880; *Harman* v. *Harwood* (1881) 58 Md. 1; and where removal for cause may be had, the officer having the power to remove is the sole judge of the existence of the cause, and his decision is not subject to review by a court of law. *Patton* v. *Vaughan* (1882) 39 Ark. 211; *Wilcox* v. *People* (1878) 90 Ill. 186; see *State* v. *Dahl, supra.* In some states the common council of a municipal corporation can remove, for cause and after a hearing, a corporate officer who is appointed or elected for a fixed term, this power being regarded as one of the common law incidents of such corporations. *Richards* v. *Town of Clarksburg* (1887) 30 W. Va. 491, 4 S. E. 774; *People* v. *Raymond* (N. Y. 1908) 129 App. Div. 477, 114 N. Y. Supp. 365; *Mayor of Savannah* v. *Grayson* (1898) 104 Ga. 105, 30 S. E. 693. But in other jurisdictions this rule is held not to apply, because municipalities, being subdivisions of the state, have only delegated authority, and because the officers should be free from fear of removal at the hands of the common council. *Attorney General* v. *Stratton* (1907) 194 Mass. 51, 79 N. E. 1073; *Speed* v. *Common Council* (1894) 98 Mich. 360, 57 N. W. 406.

OFFICERS—DEATH AFTER RE-ELECTION—VACANCY.—The incumbent of an office was re-elected for a succeeding term but died before qualifying. The relator was appointed to fill the unexpired term, and under an authority to fill vacancies by appointment, the respondent was appointed to fill the new term. The relator now claims right to the office under a provision of the constitution that all persons appointed to fill vacancies should hold until their successors were elected and qualified. The code provided that failure of the hold-over officers to qualify within the time prescribed should create a vacancy. The relator had failed to qualify for the new term. *Held*, since the relator had authority to hold over, no vacancy was created in the succeeding term by the death of the electee, and the respondent had no right to the office; but as he has not shown he has qualified he cannot maintain the action to oust the respondent. *State ex rel. Freeman* v. *Carvey* (Iowa 1915) 154 N. W. 931.

Where it is provided that an officer shall hold his office for a certain term and until his successor is duly elected and qualified, the hold-over period is considered just as much a part of an incumbent's term of office as the definite term, and passes to the one appointed to fill a vacancy in the latter term. Since, therefore, the officer holding over is a lawfully authorized incumbent, the failure of the successor to qualify does not create a vacancy, *Lawrence* v. *Hanley* (1891) 84 Mich. 399, 47 N. W. 753; *State* v. *Metcalfe* (1909) 80 Oh. St. 244, 88 N. E. 738; *Kimberlin* v. *State* (1892) 130 Ind. 120, 29 N. E. 773, unless the term of office is specified by the constitution with a provision against an incumbent succeeding himself. *Commonwealth* v. *Sheatz* (1910) 228 Pa. 301, 77 Atl. 547. Other courts, however, consider the electee as holding the title to the succeeding term subject to forfeiture for failure to qualify, in which case a vacancy is created as soon as the term arrives; the hold-over is regarded as a mere *locum tenens*, holding for public convenience. *People* v. *DeGuelle* (1909) 47 Colo. 13, 105 Pac. 1110; *People* v. *Nye* (1908) 9 Cal. App. 148, 98 Pac. 241. In New York it is provided that every officer, with certain exceptions, shall hold-over until his successor is chosen and has qualified, but that the office shall be deemed vacant for the purpose of choosing a successor after the expiration of the term. Consol. Laws, C. 47, Pub. Off. Law, § 5. This seems a desirable method of obviating the uncertainty caused by less explicit constitutions and statutory provisions.

PARTIES—FOREIGN GOVERNMENT—RIGHT TO SUE IN STATE COURTS.—Shortly before the recognition by the President of the United States of the Carranza Government in Mexico, the subsidiary government of the State of Yucatan instituted an action in the New York State Supreme Court. *Held*, on a motion to continue a temporary injunction, the plaintiff could properly sue as a foreign state, the executive recognition being binding and retroactive. *State of Yucatan* v. *Argumedo* (N. Y. Sup. Ct. 1915) 92 Misc. 547.

A king, like any other foreigner, was allowed to sue in the English courts from early times, 1 Rolle, Abr., "Court de Admiraltie" (E) 3; *King of Two Sicilies* v. *Willcox* (1851) 1 Sim. N. S. 116, even in equity, *Hullet* v. *King of Spain* (1828) 1 Dow & Cl. 169, where he subjects himself to a cross-bill, *King of Spain* v. *Hullet* (1833) 1 Cl. & F. 333, in spite of the fact that a sovereign is not ordinarily subject to suit in foreign courts. *Duke of Brunswick* v. *King of Hanover* (1848) 2 H. L. Cas. *1. A suit was allowed by the president of a

republic, *President* v. *Drummond* (1864) 33 Beav. 449, and it was supposed that the plaintiff must be an individual on whom process could be served, *Colombian Government* v. *Rothschild* (1826) 1 Sim. 94, but later cases established the right of a foreign state to sue as such. *United States* v. *Prioleau* (1865) 35 L. J. Ch. (N. S.) 7; *United States* v. *Wagner* (1867) L. R. 2 Ch. *582; *South African Republic* v. *La Compagnie Franco-Belge, etc.* [1897] 2 Ch. 487. The federal courts are by the Constitution given jurisdiction over suits by foreign states, U. S. Const. Art. 3, § 2; *King of Spain* v. *Oliver* (C. C. 1810) 2 Wash. 429, 14 Fed. Cas. 577; *The Sapphire* (1870) 78 U. S. 164, and the jurisdiction is also exercised by the New York Courts, whether the plaintiff be a government, *Republic of Mexico* v. *Arangoiz* (N. Y. 1856) 5 Duer 634; *Republic of Honduras* v. *Soto* (1889) 112 N. Y. 310, 19 N. E. 845, or a duly authorized agent. *Peel* v. *Elliott* (N. Y. 1858) 16 How. Pr. 481. But the determination of what is a foreign government is a political question, as to which the courts rely upon the decision of the executive and legislative branches, *Williams* v. *Suffolk Ins. Co.* (1839) 38 U. S. 415; *Jones* v. *United States* (1890) 137 U. S. 202, 11 Sup. Ct. Rep. 80; *Pearcy* v. *Stranahan* (1907) 205 U. S. 257, 27 Sup. Ct. Rep. 545; *O'Neil* v. *Central Leather Co.* (1915) 87 N. J. L. 552, 94 Atl. 789. The executive recognition, which the courts follow, is generally held to make the government valid *ab initio*, *Murray* v. *Vanderbilt* (N. Y. 1863) 39 Barb. 140; *Underhill* v. *Hernandez* (1897) 168 U. S. 250, 18 Sup. Ct. Rep. 83; but see *Kennett* v. *Chambers* (1852) 55 U. S. 38, and therefore recognition subsequent to the bringing of the suit seems sufficient to give the government standing in court as a party plaintiff.

POLICE POWER—PUBLIC HEALTH LAWS—ANTI-SMOKE ORDINANCE.—An anti-smoke ordinance requiring the expensive remodelling of existing equipment and conferring on a Smoke-Inspector unregulated discretion as to the improvements to be made in any particular case, was *held* to be a legitimate exercise of the police power in the interest of the public health, not contravening the Fourteenth Amendment to the United States Constitution. *The Northwestern Laundry* v. *Des Moines* (1916) 239 U. S. 486, 36 Sup. Ct. Rep. 206. See Notes, p. 239.

PRINCIPAL AND AGENT—EMPLOYMENT OF PHYSICIAN BY STATION MASTER TO ATTEND INJURED PERSON—LIABILITY OF RAILROAD FOR SERVICES.—A station agent of the defendant railroad employed a doctor to attend a trespasser struck by a train, and later notified him that the defendant would not be liable for any further services rendered the injured person. *Held*, the railroad is not liable for any services undertaken after such notice. *Vandalia R. R.* v. *Bryan* (Ind. App. 1915) 110 N. E. 218.

Although subordinate employees of a railroad cannot, under ordinary circumstances, bind it for medical services to persons injured in accidents, *St. Louis, etc. Ry.* v. *Hoover* (1890) 53 Ark. 377, 13 S. W. 1092; *Cooper* v. *N. Y. C. & H. R. R. R.* (N. Y. 1875) 6 Hun. 276, some courts, by a doctrine difficult to sustain in legal theory, imply such authority in the employee if he is the highest agent present, where an urgent necessity arises for the employment of a physician to attend injured employees or passengers. 1 Columbia Law Rev. 122; 2 Mechem, Agency § 994; *Chicago & Alton R. R.* v. *Davis* (1900) 94 Ill. App. 54; but see *Union Pac. Ry.* v. *Beatty* (1886) 35 Kan. 265, 10 Pac. 845. A

duty to furnish medical aid, based upon principles of humanity is held to arise out of the emergency, and to require the presence at all times of some agent competent to act. *Terre Haute & Ind. R. R.* v. *McMurray* (1884) 98 Ind. 358. This duty exists independently of the company's liability for the accident, and the status or relationship between the party injured and the railroad is immaterial. *Yazoo etc. R. R.* v. *Byrd* (1906) 89 Miss. 308, 42 So. 286. The authority is implied in the employee although the injured person was neither employee nor passenger, *Bonnette* v. *St. Louis etc. Ry.* (1908) 87 Ark. 197, 112 S. W. 220, and although he was contributorily negligent. *Terre Haute & Ind. R. R.* v. *McMurray, supra.* Even the courts which recognize the general doctrine, however, refuse to imply the authority in the case of an injured trespasser. *Adams & Reid* v. *Southern Ry.* (1899) 125 N. C. 565, 34 S. E. 642; *Wills* v. *International etc. Ry.* (1905) 41 Tex. Civ. App. 58, 92 S. W. 273. In any case the authority of the employee is special, not extending beyond the duty created by the emergency, and terminating when a superior official is apprised of the accident; *Sevier* v. *Birmingham etc. R. R.* (1891) 92 Ala. 258, 9 So. 405; and unless the railroad has in some way indicated to the physician that he is to continue, his recovery is limited to first aid or emergency services. *Evansville R. R.* v. *Freeland* (1892) 4 Ind. App. 207, 30 N. E. 803.

SALES—DISAFFIRMANCE OF CONTRACT—INSOLVENCY AT TIME OF PURCHASE.—The petitioners sought to disaffirm their contract and to reclaim a quantity of rubber which the bankrupt, after becoming insolvent, had obtained from them on credit. There was no proof that the bankrupt had obtained the material through false representations, or with the intention not to pay for it. *Held,* the petitioners could not disaffirm. *In re New York Commercial Co.* (C. C. A., 2nd Cir., 1915) 228 Fed. 120.

False representations, if material in inducing the vendor to part with his property, are in law a fraud upon him and entitle him to disaffirm his contract, regardless of whether the vendee, at the time of the purchase, knew that his statements were false, *Newman* v. *Claflin Co.* (1899) 107 Ga. 89, 32 S. E. 943; *Field* v. *Morse* (1898) 54 Neb. 789, 75 N. W. 58, or intended to pay for the goods. *Atlas Shoe Co.* v. *Bechard* (1906) 102 Me. 197, 66 Atl. 390; *Moore* v. *Hinsdale* (1895) 77 Mo. App. 217; see *Ellet-Kendall Co.* v. *Ward* (C. C. A. 1911) 187 Fed. 982. But the vendee is under no duty to volunteer information as to his financial condition; consequently his concealment of the fact that he is insolvent at the time of the purchase is not of itself a fraud upon the vendor, and does not entitle him to disaffirm. *Illinois Leather Co.* v. *Flynn* (1895) 108 Mich. 91, 65 N. W. 519; *Bell* v. *Ellis* (1867) 33 Cal. 620; see *Watson* v. *Silsby* (1896) 166 Mass. 57, 43 N. E. 1117. If, however, the vendee conceals his insolvency with the present intent never to pay for the goods, he perpetrates a fraud, and the courts permit the vendor to disaffirm the sale and recover his property or its value, *Donaldson* v. *Farwell* (1876) 93 U. S. 631; *Brower* v. *Goodyer* (1883) 88 Ind. 572; but see *Bughman* v. *Central Bank* (1893) 159 Pa. 94, 28 Atl. 209, provided that it has not been acquired by a purchaser for value and without notice. See *Hacker* v. *Monroe* (1898) 176 Ill. 384, 52 N. E. 12; Burdick, Sales (3rd. ed.) §§ 289, 291. But whenever the vendee has paid a part of the consideration, the vendor must place him in *statu quo* or offer to do so before he is entitled to

disaffirm. *Bowen* v. *Schuler* (1866) 41 Ill. 192; *Weed* v. *Page* (1857) 7 Wis. 503. In the principal case, there was neither false representation nor concealment with intent not to pay, and the court is supported by the weight of authority in denying relief.

SHERMAN ANTI-TRUST ACT—SURVIVAL OF ACTIONS—ACTION FOR TRIPLE DAMAGES.—The plaintiff, a New York corporation, sued at law to recover from the defendant triple damages under section seven of the Sherman Anti-Trust Law (26 Stat. 209). During the pendency of the action, the plaintiff corporation, having become insolvent, was judicially dissolved and a receiver of the assets was appointed in accordance with the provisions of the New York General Corporation Law. The receiver moved to be substituted as plaintiff in the action in the place of the defunct corporation. *Held,* the motion should be granted, since the right of action passed by judicial assignment into the hands of the receiver as an incident to the property of the corporation. *Imperial Film Exchange* v. *General Film Co.* (U. S. D. C., N. Y., 1916) not yet reported. See Notes, p. 234.

STATUTES—HARRISON LAW—CONSTRUCTION OF "ANY PERSON".—The Harrison Law provides in § 1 that dealers in opium and similar drugs shall register, and pay a special tax, and in § 8 that it shall be unlawful for "any person" not registered and who has not paid the tax to have any of the said drugs in his possession, excepting nurses, common carriers, and certain others. The plaintiff in error was not a dealer, but had opium in his possession. The court affirmed his conviction, holding that the words "any person" in the Act are not confined to the dealers mentioned in the first section. *Wilson* v. *United States* (C. C. A., 2nd Cir., 1916) 54 N. Y. L. J. 1341.

This decision is the first interpretation of the Harrison Act by a Circuit Court of Appeals. Several District Courts had given the Act the narrow construction contended for by the plaintiff in error here, apparently because of the heavy penalties imposed for violations, *United States* v. *Woods* (D. C. 1915) 224 Fed. 278; *United States* v. *Jin Fuey Moy* (D. C. 1915) 225 Fed. 1003, or because it was a penal statute. *United States* v. *Wilson* (D. C. 1915) 225 Fed. 82. On the other hand, an indictment charging solely possession of opium without having registered was upheld, partly on the ground that the Act, though penal, was designed to prevent fraud on the revenue, and hence should be fairly construed. *United States* v. *Brown* (D. C. 1915) 224 Fed. 135; *cf. United States* v. *Stowell* (1890) 133 U. S. 1, 10 Sup. Ct. Rep. 244. The principal case does not refer to any special canon of interpretation, but looks to the legislative intent, which after all is the controlling factor always, whatever the kind of statute involved. See *Johnson* v. *Southern Pacific Co.* (1904) 196 U. S. 1, 17, 25 Sup. Ct. Rep. 158. That Congress intended the words "any person" in the comprehensive sense seems clear from the fact that they felt it necessary to except expressly in § 8 nurses and common carriers, neither of whom were required to register in § 1. The question of the constitutionality of the Act as thus construed was not raised in the principal case, but it seems at least doubtful. It is hard to uphold it as a revenue measure, because it punishes persons who are not liable to the tax. *Cf. United States* v. *De Witt* (1870) 76 U. S. 41. And the commerce clause does not give Congress control of all dealings with imported articles after importation. This might therefore seem to be an attempted usurpation

of the police power. *Cf. Keller* v. *United States* (1909) 213 U. S. 138, 29 Sup. Ct. 470.

SUNDAY LAW IN NEW YORK—PUBLIC SHOW—MOVING PICTURE THEATRE.—In an action by a public officer to enjoin the threatened operation of a moving picture theatre on Sunday it appeared that the public in general were invited to attend upon payment of an admission fee. *Semble,* this would be a violation of the Sunday Laws. *Hamlin* v. *Bender* (Sup. Ct., Spec. Term, 1915) 155 N. Y. Supp. 963.

While state legislation as to the observance of the Sabbath is almost coeval with the formation of the state government, see *Lindenmuller* v. *People* (N. Y. 1861) 33 Barb. 548, the contradictory interpretations put upon that legislation by the courts have caused great difficulty and uncertainty. See *People* v. *Owen* (1915) 155 N. Y. Supp. 1003. By construction of the statutes, particularly what is now § 2145 of the Penal Law, Laws of 1909, Ch. 88, relating to public sports and shows, it has been settled that a Sunday baseball game to which the public is invited and to which an admission fee is charged comes within the prohibition of that section, *People* v. *Poole* (1904) 44 Misc. 118, 89 N. Y. Supp. 773; *Brighton Athletic Club* v. *McAdoo* (1905) 47 Misc. 432, 94 N. Y. Supp. 391; and several decisions have been rested upon the public character of the games in question, holding them a violation of the law even though no admission fee was charged. *Southern Tier Baseball Association* v. *Day* (1910) 69 Misc. 53, 125 N. Y. Supp. 733; *Greater Newburgh Amusement Co.* v. *Sayer* (1913) 81 Misc. 307, 142 N. Y. Supp. 69; *cf. People* v. *DeMott* (1902) 38 Misc. 171, 77 N. Y. Supp. 249. The Sunday exhibition of moving pictures to all of the public who chose to pay admission has also been held by some courts to be illegal; *United Vaudeville Co.* v. *Zeller* (1908) 58 Misc. 16, 108 N. Y. Supp. 789; *cf. Velodrome Co.* v. *Stengel* (1915) 91 Misc. 580, 155 N. Y. Supp. 575; while others have declared that the law is not violated unless the peace of the day is actually disturbed or the exhibition is an outdoor one. *People* v. *Hemleb* (1908) 127 App. Div. 356, 111 N. Y. Supp. 690; see *People* v. *Rand* (1915) 91 Misc. 276, 154 N. Y. Supp. 293. It is the fact of performance before the general public however, that has been emphasized by the majority of cases as the essence of the prohibition, *People* v. *Moses* (1893) 140 N. Y. 214, 35 N. E. 499; *Paulding* v. *Lane* (1907) 55 Misc. 37, 104 N. Y. Supp. 1051; *cf. People* v. *Dunford* (1912) 207 N. Y. 17, 100 N. E. 433; *People* v. *Dennin* (1885) 35 Hun, 327, and the opinion expressed in the principal case is clearly in accord with their reasoning.

SURETYSHIP—ALTERATION OF INSTRUMENTS—DISCHARGE OF SURETY BY ADDITION OF OTHER SURETIES.—The defendant together with a co-surety, signed a blank bond in order to secure the release of the principal. The bond was rejected because of the insufficiency of sureties, and a third surety was added without the defendant's knowledge. The defendant claims that the addition of the surety discharged him from liability. *Held,* the defendant was not discharged. *Keilsohn* v. *Slaton* (Ga. 1915) 87 S. E. 297.

A surety is bound only to the extent of the obligation executed by him; so that any material alteration of that instrument without his consent discharges him. Pingrey, Suretyship & Guaranty (2nd ed.) § 103. The courts will not in such a case consider whether the alteration results in a benefit to the surety or not. *Board of County*

Commissioners v. *Greenleaf* (1900) 80 Minn. 242, 83 N. W. 157; see 16 Columbia Law Rev., 79. The change must be made, however, by one who is not a stranger to the contract; for otherwise there is no alteration in point of law or change in the status of the parties. *Anderson* v. *Bellenger* (1888) 87 Ala. 334, 6 So. 82; Brandt, Suretyship and Guaranty (3rd ed.) § 416. If, after delivery of a promissory note, a surety is added without the maker's knowledge, the better view is that since the maker is still primarily liable for the whole amount without contribution, he is not discharged from liability. *Miller* v. *Finley* (1872) 26 Mich. 249; *Mersman* v. *Werges* (1884) 112 U. S. 139, 5 Sup. Ct. 65; but see *Chappell* v. *Spencer* (N. Y. 1857) 23 Barb. 584. Nor is the original surety discharged from liability where a second surety has signed without his knowledge. *McCaughey* v. *Smith* (1863) 27 N. Y. 39; *Ward* v. *Hackett* (1883) 30 Minn. 150, 14 N. W. 578. In the case of official bonds executed and delivered, the addition of a surety without the knowledge of the original surety discharges the latter. *Stoner* v. *Keith County* (1896) 48 Neb. 279, 288, 67 N. W. 311. See *Taylor* v. *Johnson* (1855) 17 Ga. 521; *Anderson* v. *Bellenger, supra.* But where the bond is executed in blank, it is generally held, as in the principal case, that the original surety impliedly authorizes the securing of additional sureties in order to effect the purpose of the bond. *Boyd* v. *Agricultural Ins. Co.* (1904) 20 Colo. App. 28, 76 Pac. 986; *Lewiston* v. *Gagne* (1896) 89 Me. 395, 36 Atl. 629; see *Holthouse* v. *State* (1912) 49 Ind. App. 178, 97 N. E. 130; *cf. Snyder* v. *Van Doren* (1879) 46 Wis. 602, 1 N. W. 285.

WILLS AND ADMINISTRATION—STATUTE OF LIMITATIONS—SET-OFF OF BARRED DEBT AGAINST DISTRIBUTIVE SHARE.—A distributee was indebted to the intestate in an amount larger than his distributive share, but the debt was barred by the Statute of Limitations. He acknowledged the existence of the debt while on the witness stand during settlement proceedings. *Held,* since the distributee had tolled the statute, he could not participate in the distribution. *Middleton's Estate* (Pa., O. C., 1915) 73 Legal Intelligencer 87.

It is a general rule that a legatee of a general legacy or a distributee of an intestate's estate, when a debtor to the estate, is not entitled to receive his share without bringing his debt into account, and the executor is justified in applying the legacy or share towards the satisfaction of the debt. *Armour* v. *Kendall* (1855) 15 R. I. 193; *Smith* v. *Murray* (N. Y. 1882) 1 Dem. Sur. 34; see *Rogers* v. *Murdock* (N. Y. 1887) 45 Hun 30. This rule applies in England and many of the United States, even though the debt is barred by the Statute of Limitations, so long as the executor does not bring an action to enforce payment, on the theory that the statute bars only the right of action and not the debt, and that the executor has an equitable lien and right of detention on the distributee's share sufficient to pay the indebtedness to the estate. *Holmes* v. *McPheeters* (1898) 149 Ind. 587, 49 N. E. 452; *Holden* v. *Spier* (1902) 65 Kan. 412, 70 Pac. 348; *Re Timerson* (N. Y. 1903) 39 Misc. 675, 80 N. Y. Supp. 639; *cf. In re Bruce* (1908) 2 Ch. 682. This doctrine seems to be based on the case of *Courtenay* v. *Williams* (1844) 3 Hare 539, which was decided when the legatee's only right was to proceed against the executor in a court of equity. But in the jurisdiction of the principal case and some others, the legatee has a legal claim which he may enforce at law, and the equitable doctrine is held inapplicable; and so, unless the statute is

tolled so as to revive the barred debt, as in the principal case, it may not be deducted by the administrator. *Holt* v. *Libby* (1888) 80 Me. 329, 14 Atl. 201; see *Allen* v. *Edwards* (1883) 136 Mass. 138; *Light's Estate* (1890) 136 Pa. 211, 20 Atl. 536.

WORKMEN'S COMPENSATION ACTS—ACCIDENTS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—The New York Workmen's Compensation Act provides for recovery only for injuries sustained in certain specified "hazardous" employments, enumerating, among others, the preparation of meats or meat products, and the operation of wagons or other vehicles. The deceased, employed by a butcher to drive a meat wagon and act as a delivery man, was injured by falling on broken glass while delivering a package on foot after he had stopped delivering with the horse and wagon. *Held,* he was not within either specified hazardous employment at the time of the accident and these injuries did not arise out of his employment and were not incidental to it. *Newman* v. *Newman* (N. Y. 1915) 169 App. Div. 745, 155 N. Y. Supp. 665.

It is the general rule that there can be no recovery under the Workmen's Compensation Acts unless the injury arose out of and in the course of the employment. *In re Savage* (Mass. 1915) 110 N. E. 283; *Hoenig* v. *Industrial Comm.* (1915) 159 Wis. 646, 150 N. W. 996. "In the course of" covers what an employee may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing. *Moore* v. *Manchester Liners, Ltd.* [1910] A. C. 498, 500; *Raynor* v. *Sligh Furniture Co.* (1914) 180 Mich. 168, 146 N. W. 665; *Bryant* v. *Fissell* (1913) 84 N. J. L. 72, 86 Atl. 458; *State* v. *Dist. Ct.* (1915) 129 Minn. 176, 151 N. W. 912. An accident is said to arise "out of" the employment when the employment is the origin or a contributory cause; *Matter of McNicol* (1913) 215 Mass. 497, 102 N. E. 697; *Zabriskie* v. *Erie Ry.* (1914) 86 N. J. L. 266, 92 Atl. 385; and the fact that the injury gives rise to a cause of action against a third person or that an outside agency contributes to the injury does not bar a recovery, *Zabriskie* v. *Erie Ry. supra; In re Reithel* (Mass. 1915) 109 N. E. 951, nor is a recovery prevented where the employee owes a duty both to his employer and to another. *In re McPhee* (Mass. 1915) 109 N. E. 633. These statutes are remedial and are to be broadly interpreted. *Moore* v. *Lehigh Valley Ry.* (N. Y. 1915) 169 App. Div. 177, 154 N. Y. Supp. 620. The injury need not be anticipated nor peculiar to the particular employment in which he is engaged. *State* v. *Dist. Ct.* (1915) 129 Minn. 502, 153 N. W. 119. In the jurisdiction of the principal case, the statute covers only certain hazardous industries and has given rise to such a great diversity of interpretation, even by the same court, *cf. Larsen* v. *Paine Drug Co.* (N. Y. 1915) 169 App. Div. 838, 155 N. Y. Supp. 759; *Gleisner* v. *Gross & Herbener* (N. Y. 1915) 170 App. Div. 37, 155 N. Y. Supp. 946; *Wilson* v. *Dorflinger & Sons* (N. Y. 1915) 170 App. Div. 119, 155 N. Y. Supp. 857, that it is impossible to predict what will be the law in New York until the Court of Appeals has handed down a decision. Furthermore, the statute seems to have failed, to a large extent, in its purpose to prevent a great mass of litigation as to the liability of the employer, since fully as many questions are brought before the court as before the statute, though now in a different form.